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THE JURISPRUDENCE OF ARTICLE III: PERSPECTIVES ON THE "CASE OR CONTROVERSY" REQUIREMENT

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The standing, ripeness, and mootness doctrines are frequently criticized by those who seek greater access to federal courts. In this Article, Professor Brilmayer examines the theoretical underpinnings of the "case or controversy" requirement of article III and concludes that these justiciability rules are appropriate. They serve three interrelated policies: the smooth allocation of power among courts over time; the proper representation of individuals who will be affected by an adverse judgment; and the interest in self-determination. Professor Brilmayer proposes that courts explicitly rely on these policies in deciding justiciability questions.

THEORETICAL understanding of legal institutions is not always commensurate with their importance, allowing the jurisprudential significance of some legal doctrines to escape unnoticed. An important example is the "case or controversy" requirement derived from article III of the federal Constitution,[1] which dictates the manner in which constitutional issues must arise if they are to be addressed by the federal courts. The case or controversy requirement, also called the "justiciability" doctrine, includes more specialized notions of ripeness, mootness, and standing to sue, and prohibits consideration of constitutional issues except as a necessary incident to the resolution of a concrete "case" or "controversy."[2] This doctrine

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[1] U.S. CONST. art. III, § 2, states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART &

limits the jurisdiction of federal courts; when its requirements are not satisfied courts are without power to proceed, regardless of the wishes of the parties.[3] Such restrictions have been vigorously attacked as unnecessary and unnatural,[4] and the explanations provided by the Court have not been sufficiently persuasive to deflect the cynical suggestion that the Court has manipulated justiciability questions to mask hostility to the merits of constitutional claims.[5] This Article will show that these doctrines are unified by purposes which have not previously been well understood. Examination of these purposes should provide persons interested in constitutional litigation, either as a means to social change or as a method of preserving the status quo, with a conceptual basis for procedural framing of constitutional arguments.

To illustrate what the standing, ripeness, and mootness doctrines hold, imagine a citizen in a town that has recently enacted an ordinance prohibiting the posting of campaign signs on residential property. Assume he believes it is unconstitutional to restrict political expression this way, but has posted no campaign signs himself and therefore has not been prosecuted. In fact, he has no present interest in putting up a sign. He does, however, resent this ordinance. What can he do?

First, he might initiate litigation by alleging the ordinance infringes the first amendment rights of others. His neighbor would put up signs but for the ordinance. Second, he might attempt to show that his own future first amendment rights are threatened. Next year, he may wish to post campaign signs. The first approach raises standing objections, the second, ripeness objections. The standing doctrine holds that one may not assert the rights of other persons; it is necessary to allege a "personal stake" in the dispute.[6] If the citizen straight-

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WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64–241 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

[3] *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (although lower court did not address the standing issue, Supreme Court must since it is a question of subject matter jurisdiction); Tileston v. Ullman, 318 U.S. 44 (1943) (state determination of justiciability not binding on Supreme Court).

[4] *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

[5] *See* Berch, *Unchain the Courts — An Essay on the Role of the Federal Courts in the Vindication of Social Rights*, 1976 ARIZ. ST. L.J. 437.

[6] The phrase "personal stake" is taken from Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). *See also* Warth v. Seldin, 422 U.S. 490 (1975); McGowan v. Maryland, 366 U.S. 420 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

forwardly insists his interests are not involved but the rights of his neighbors are, he will be denied access to federal court, and most state courts also.[7] If the citizen tries the second approach — hypothesizing a personal future interest — then the ripeness requirement must be met. The danger that supposedly motivates him must be real and immediate, rather than distant and speculative.[8] There must be concrete demonstration that some harm really will occur; it must be based on objective evidence and not merely his own assertions.[9] Otherwise the standing limitation could be subverted by self-serving hypotheses about future harm.

A related and third limitation is the doctrine of mootness. Assume our citizen violates the statute and is arrested, but the city council sees the error of its ways and repeals the ordinance so that charges are dropped. The citizen wishes to plunge onward, however, appealing if necessary to the United States Supreme Court. This would not be permitted, since the case would be moot.[10] Now that charges have been dropped, the sole motivation for pursuing the matter must be assertion of the rights of others, most likely persons faced with similar statutes. When a litigant fails to meet the ripeness requirement, the dubious nature of hypothesized future harm suggests that it is a pretext for complaining about infringement of the rights of others; when a claim is moot, the past harm appears to be a pretext for doing essentially the same thing.

These case or controversy doctrines are viewed dimly by both layman and the bar.[11] Law students first make their acquaintance in civil procedure courses, where the doctrines win prizes for being arcane, technical, and pointless. Lawyers

[7] Several states, including Alabama, Colorado, Florida, Maine, Massachusetts, New Hampshire, and North Carolina, allow advisory opinions. HART & WECHSLER, *supra* note 2, at 69–70. However, state court determinations of standing are not binding on the Supreme Court. *See* Tileston v. Ullman, 318 U.S. 44 (1943).

[8] *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (challenge to anticontraceptive statute disallowed because it had never been enforced and, the Court thought, would never be enforced); United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947) ("A hypothetical threat is not enough.").

[9] Laird v. Tatum, 408 U.S. 1, 13–14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."); Poe v. Ullman, 367 U.S. 497 (1961).

[10] County of Los Angeles v. Davis, 99 S. Ct. 1379 (1979). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12, at 39 (3d ed. 1976) (no case or controversy remaining once issue is moot).

A number of exceptions to the general prohibition against hearing moot cases are recognized. For instance, a criminal defendant may be able to challenge his conviction even after his sentence has been served if the conviction carries with it "collateral legal consequences." Sibron v. New York, 392 U.S. 40 (1968). In addition, a case may be heard if the issue involved is "capable of repetition, yet evading review." *See id.*; p. 317 *infra*.

[11] *See* note 4 *supra*.

face them when framing constitutional challenges, for the courts seem determined to make life difficult through their loyalty to technicalities which seem to bear no rational relationship to anything important. Nonlawyers encounter these doctrinal mysteries when reading about cases that are interesting for other reasons,[12] and conclude that this is typical legalistic nonsense. And other legal systems seem to do quite well without such requirements.[13] Since there seems, at least at first glance, to be little reason to focus on the procedural context in which admittedly important constitutional issues are raised, the courts appear to be either dissembling or hung up on procedural red tape.

Commonly, two reasons are offered to explain why courts act this way. The first is textual; it takes as its premise the wording of article III. Article III defines the federal judicial power in terms of the power to decide certain classes of "cases" and "controversies"; cases involving federal questions, controversies between citizens of diverse states, and so forth.[14] The wording has traditionally been understood to include the power to resolve abstract legal issues, including constitutional issues, but only as a necessary byproduct of the resolution of particular disputes between individuals.[15] Judicial review of statutes is thus justified by and limited to decision of "real" cases. Litigation whose sole justification is the analysis of problems of constitutional interpretation is not a case or controversy in this sense.

There are minor historical problems with this analysis. English practice at the time the Constitution was framed included resolution of some abstract disputes;[16] in addition, the law of declaratory judgments has developed to permit adjudication of some disputes that would not then have been heard.[17] The practice at the time the Constitution was written

[12] *E.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974); Roe v. Wade, 410 U.S. 113 (1973).

[13] M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW 77 (1979).

[14] *See* note 1 *supra*.

[15] *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549 (1947) (Supreme Court will not decide constitutional issues in the abstract); Tennessee Publishing Co. v. American Nat'l Bank, 299 U.S. 18 (1936) (constitutional issue should not be decided unless necessary to case).

[16] *See* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

[17] *Compare* Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928) (declaratory judgment, which was unknown to either English or American courts at the time the Constitution was adopted, is beyond the federal judiciary's authority), *with* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–41 (1937) (Declaratory Judgment Act of 1934 did not violate article III case or controversy requirement).

was therefore both more restrictive and more lenient than at present. Courts nonetheless still allude to historical understandings, even while admitting that today's understandings are slightly altered.[18]

The main reason why this textual and historical approach is no longer entirely persuasive, however, is that today many see constitutional adjudication not justified primarily as a means to resolve disputes, but as an end in itself, for judicial review vindicates the rights of the unpopular minorities the Constitution was designed to protect.[19] Whether one phrases this rationale in terms of social contract theory[20] or interest group politics,[21] the courts are seen as having primary responsibility to take action when necessary to curb majoritarian excesses. This rationale has gained acceptance and is currently considered a cornerstone of constitutional jurisprudence.[22] If the purpose of constitutional review is restraint of overreaching majorities, however, there seems to be no reason to insist on the traditional interpretation of the "case or controversy" wording of article III. Instead, the availability of review should turn on whether a statute arguably violates the constitutional rights of minorities and not the procedural posture in which the issue is presented.

The second common explanation for the contemporary application of the case or controversy limitation accepts this theory of the basis of constitutional adjudication, and goes on to take a cynical perspective on a perceived unwillingness of the Burger Court to fulfill this constitutional responsibility. The charge is that the doctrines are being used as a convenient opportunity to avoid both implementation of past decisions of the Warren Court and resolution of new and controversial social issues.[23] Sometimes a similar observation is expressed more approvingly; Bickel, for instance, applauded what he saw as legitimate decisions to delay controversial issues until

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[18] The historical difficulties are conceded in Flast v. Cohen, 392 U.S. 83, 95–96 (1968).

[19] *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 131–49 (1977).

[20] *See, e.g.*, D. RICHARDS, THE MORAL CRITICISM OF LAW 49–56 (1977).

[21] Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962).

[22] The growth of the rationale was inspired in part by the famous footnote four in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See also* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933 (1973).

[23] *See* Berch, *supra* note 5. The legitimacy of using the justiciability doctrines to avoid difficult issues is discussed in Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

they were politically less volatile.[24] If the justiciability doctrines have no principled purposes it may be reasonable to conclude that they mask either political caution or hostility to the merits of a constitutional claim. The Court's refusal to acknowledge that caution or hostility motivates the doctrines is then, quite obviously, dishonest. On the other hand, the previous inability to articulate a principled explanation does not mean that no such explanation exists. The hypothesis here is that a satisfactory theory does exist, and does not depend on the "case decision" justification for review which many people today find old-fashioned. While it is possible to deny that such a theory actually would vindicate what can be characterized as past dishonest avoidance of the merits, even a cynic should be pleased to have a coherent analysis to which to hold the Court in the future.

This Article will attempt to provide such an analysis by discussing three interrelated policies of article III: the smooth allocation of power among courts over time;[25] the unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented;[26] and the importance of placing control over political processes in the hands of the people most closely involved.[27] These three perspectives will be referred to as restraint, representation, and self-determination. None of these themes is new to the case law, but thus far they have been summarily or conclusorily treated. They are the key concepts in understanding the proper function of article III courts.

I. RESTRAINT

When faced with problems of whether particular issues are properly presented for adjudication, courts frequently allude to judicial restraint as a reason for hesitation about passing on the merits. In an early case discussing justiciability the Court wrote:

> [We have] no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as [we are] called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, [the Court] is bound by two rules, to which it has rigidly adhered, *one*, never to anticipate a question of constitutional law in advance of the necessity of

[24] A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[25] *See* pp. 303–06 *infra*.

[26] *See* pp. 306–10 *infra*.

[27] *See* pp. 310–15 *infra*.

> deciding it; *the other* never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[28]

The first of these rules would prohibit adjudication in the first amendment hypothetical because there is no need to decide the issue — disallowing litigation would not harm the citizen plaintiff — and according to this rule the Court should not resolve the question before such a need arises. The second principle the Court recited is related to the first because, even where there is a justiciable case, an overly broad rule does implicitly what courts are forbidden to do explicitly; namely, it resolves the legal merits of questions not actually posed and which therefore need not be decided. These principles contemplate an essentially passive judicial role. They are reflected also in a variety of other doctrines, such as finality of appealable orders[29] and adequate and independent state grounds.[30]

The cited reasoning merely states the traditional idea of judicial function without justifying it. It remains to be shown why we should defer resolution of legal issues until they are raised by the necessity of a concrete case. One explanation might be that this prevents undue interference with the decisions of other branches of government, whose activities would otherwise be subject to the constant scrutiny of the courts. Thus it is sometimes said that judicial review should be held to a minimum since review is a countermajoritarian institution in a fundamentally democratic society. Courts should therefore defer to the judgments of other branches of government, which have presumably concluded that their activities satisfy constitutional standards.[31]

Clearly, there must be more to judicial restraint than this reasoning suggests. In the first place, according to the usual understanding of judicial function, courts are not supposed to anticipate issues even when no constitutional questions are involved. When formulating common law principles, they are

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[28] Liverpool, N.Y. & Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (emphasis added). *See also* Poe v. Ullman, 367 U.S. 497, 503 (1961) ("'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.'") (quoting Parker v. County of Los Angeles, 338 U.S. 327, 333 (1949)); Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J., concurring); California v. San Pablo R.R., 149 U.S. 308 (1893).

[29] *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 509–10 (1975) (Rehnquist, J., dissenting).

[30] *See, e.g.*, Parker v. County of Los Angeles, 338 U.S. 327 (1949) (allowing state to construe state statute); *cf.* Orr v. Orr, 99 S. Ct. 1102 (1979) (discussing standing and the adequate and independent state ground doctrine).

[31] *See* A. BICKEL, *supra* note 24.

obliged to limit their discussion to the case at hand. Discussion of hypothetical situations may be dismissed by later courts as mere dicta. Moreover, as stated, the principle of "undue interference" begs the question of what interference is "undue." Where there is a written constitution, some measure of countermajoritarianism is positively desirable. And in seeking to limit judicial contradiction of majority will, proponents of judicial restraint are relying upon an irrelevant fact, namely, the fact that federal judges do not run for office. This fact is irrelevant because if legislatures seriously fulfill their responsibilities to consider whether their activities are constitutional, they also risk behaving in a countermajoritarian fashion. Since refusal to yield to majority preferences when it would lead to constitutional violations generally frustrates democracy, there is little significance to the fact that it is appointed rather than elected officials who decide these constitutional questions. The only reason for leaving such decisions to legislative judgment would be if legislatures do not in fact fulfill their countermajoritarian responsibilities, and this were thought desirable.

A better explanation of the concept of judicial restraint is based on the relationships among courts over time. Stare decisis in effect subordinates the opinions and policy choices of later courts to those of the present court. Given that opinions about the proper scope of constitutional protections are bound to differ, and given that a decision settles the matter for a while at least, it is obviously important who is vested with the responsibility for making the initial decision and, thus, at what point the issue is considered ready for decision. To allow a court to settle any matter it wished to address would give precedence to the preferences of earlier courts, who are able to tie the hands of the subsequent ones. There is a clear need for some mechanism to allocate decisionmaking responsibility among successive courts, by specifying the point at which an issue may be addressed.

Comparison of legislative and judicial systems of authority demonstrates the special accommodation between continuity and change which results from the theory of precedent. A legislative decision does not legally bind the actions of future legislatures: power is divided equally since any group can rescind the actions of its predecessors. Continuity is possible because the process of applying decisions does not give rise to opportunities for reexamination of the wisdom of the decision; legislatures do not implement their own decisions, and the courts and executives who do apply these decisions have limited rights to question the standards they apply. Courts assure

continuity in the same way, by binding the institutions charged with applying legal standards; but those charged with applying the standards are other *courts* operating under the doctrine of stare decisis.

The common law method maintains this process by assigning to each court only the legal issues that arise during that court's term. Allowing issues to be resolved at a faster rate would have one of two undesirable results: inflexibility from overcommitment to outmoded standards (as the average age of the precedent increased) or an erosion of the stare decisis doctrine through a high rate of overruling. While a high rate of default through overruling would counteract the faster rate of establishment of legal principles, it would be costly, for failure to honor past commitments undermines the ability to make new ones.

This problem is particularly troublesome if judicial review of legislation is viewed as a tool of social engineering, for stare decisis is essential if courts are to have a maximum impact in achieving social reforms. Since the resolution of a single case does little to advance far-reaching goals such as racial integration, the Supreme Court must be able to alter the incentive structure of other individuals it hopes to influence if it is to induce compliance with constitutional rulings. To do so, the Court must clearly and credibly state the legal repercussions of disobedience. This means that in order to implement social programs — particularly ambitious ones where voluntary compliance is least likely — the Court must be able to commit the lower courts and later Supreme Courts to a course of action. Otherwise, recalcitrant individuals will evade the ruling in the hope that by the time they are brought into court, the law will have changed. Even if the reform movement is *not* dissipated by a change in the law, it is still slowed since every case must be individually enforced.

Anything that serves to weaken the force of precedent thus threatens both judicial power generally and the power to implement constitutional norms specifically. Even those who would allow courts to decide legal issues in the abstract would have to admit the necessity of stare decisis; in fact, the very concept of abstract resolution of a legal issue depends on a theory of precedent. What would be the point of resolving the first amendment claim in our hypothetical example, if not to settle the constitutionality of this or similar statutes for the future? Indeed it is precisely when the concerned citizen has no personal stake that his motivation in litigating the constitutional issue is most dependent upon the vitality of the doc-

trine of stare decisis. Yet procedural innovation to allow litigation of abstract issues undermines the very institution upon which reform movements rely.

II. REPRESENTATION

A second philosophical perspective on the case or controversy requirement has to do with due process. It focuses on the fairness problems that would arise if an ideological challenger — a challenger without the traditional personal stake — were permitted to litigate a constitutional claim. This perspective will be referred to as the "representation" perspective in order to highlight the similarities between justiciability doctrine and the requirement, in class action litigation, that the named plaintiff be a member of the class he seeks to represent.

Recall the first amendment hypothetical given at the outset of the discussion. It is unlikely that the concerned citizen in that case would admit at the start of the litigation, "this is a statute which never hurt anybody and never will." Rather, he will argue that some as yet unidentified persons will desire to post campaign signs but will be stopped from doing so by the ordinance in question. He will support his ideological arguments by reference to the tangible interests of such persons.

The due process problems that would be created if the concerned citizen were permitted to raise such constitutional claims can be illustrated by comparison to the fairness questions that arise in the class action context as a result of the application of res judicata theory. Under the theory of res judicata, resolution of combined law/fact disputes are binding in a later suit between the same parties. In a typical case, the operation of this rule is unremarkable. It does not seem unfair to say, for example, that if Jones sues Acme Appliances for selling him a defective refrigerator and loses, he is foreclosed from suing later on the same set of facts. However, res judicata has a more extensive impact in class action litigation: in certain narrowly defined circumstances, a litigant may be bound by a judgment obtained by someone else.[32] If Acme sold one hundred refrigerators all defective in exactly the same way, one purchaser might be able to sue on behalf of himself and the other ninety-nine. Everyone will be bound by the decision, whether it results in a judgment for Acme or for the class of purchasers.

The Supreme Court has interpreted the due process clause

[32] FED. R. CIV. P. 23(c)(3) establishes the requirements that class actions must satisfy to be given effect as res judicata.

of the Constitution as imposing limits on the extent to which a person may be bound by the res judicata effect of a class action. In particular, the class that will be bound must in most circumstances be narrowly defined to include only those individuals who are similarly situated to the class representative who brought the suit. There are other procedural safeguards that must be followed if the judgment is to be binding. In many situations, absent class members must be notified of the litigation and given a chance to "opt out" or participate;[33] also, the class representative cannot assert the rights of absent members with whom there is a potential conflict of interest.[34] It is considered unfair and unconstitutional to greet litigant Smith, the purchaser of a defective Acme refrigerator, with the news that his rights have already been determined in some prior litigation between Acme and Jones, an individual he has never heard of.

If any concerned citizen who wished to were permitted to litigate constitutional issues, res judicata would ordinarily not be a problem for anyone but the citizen himself. Thus, the position of the ideological challenger is not precisely comparable to that of a class representative. However, stare decisis, a doctrine that is related to res judicata, would come into play. In general, of course, the impact of stare decisis is less dramatic than that of res judicata. It is not quite as serious to tell Smith that a ten-year-old precedent resolves the determinative legal issue. Since the factual determinations from that case would not be binding, Smith could try to show that the facts — and therefore the legal issues — of that precedent are somewhat different, and therefore not controlling. A device somewhat akin to the "similarity of circumstances" requirement in class actions is at work. If Smith is in a different position from the earlier plaintiff, he can distinguish that case and attempt to reargue the legal merits. If he cannot do this, however, because the situations are "indistinguishable," he will be bound. In fact, in at least one context, federal courts have recognized that the impact of stare decisis may necessitate special protection in much the same way as res judicata.[35]

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[33] FED. R. CIV. P. 23(c)(2)(A) provides procedures for class members to exclude themselves from the class. These procedures apply only to rule 23(b)(3) class actions, however.

[34] Hansberry v. Lee, 311 U.S. 32, 44–45 (1940). *See also* FED. R. CIV. P. 23(b)(3).

[35] In Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), *aff'd in part and rev'd in part sub nom.* United States v. Ray, 423 F.2d 16 (5th Cir. 1970), intervention as of right under rule 24(a) was permitted because the intervenor had a substantial interest in litigation interpreting a federal statute; the court allowed inter-

Because stare decisis, like res judicata, may have a binding effect, we should be reluctant to permit the concerned citizen to assert the legal rights of his neighbor who perhaps would like to post campaign signs. We need to protect the neighbor's present and future interests; we do not want the concerned citizen to litigate abstract principles of constitutional law when the precedent established will govern someone else's first amendment rights. Similarly, even if the concerned citizen has his own claim, we should insist that he state it with specificity so that no overly broad precedent will threaten the rights of persons in different positions.

The binding effect of stare decisis might not be an obstacle to suits by ideological challengers if procedural safeguards could be devised to protect the rights of absent third parties. There are at least three possibilities: extending opportunities to "opt out," denying an adverse ruling any precedential effect, or defining representative capacity according to criteria other than similarity of interest. In fact, however, none of these safeguards are workable. Opt-out provisions are not likely to provide much protection when it is stare decisis rather than res judicata that will bind absent parties. One difficulty is whether presumptively to include or presumptively to exclude the affected individuals. It seems unfair to include everyone who does not specifically request to be excluded; the class of all present and future persons whose rights may be implicated is so ill-defined and scattered that no effective notice of the pending litigation can be given. If notice cannot be given, can it be fair to place the burden of determining the existence of litigation on the absent class members? They may not even be born yet. For similar reasons, it would be unworkable presumptively to exclude all persons who do not choose to participate. Aside from the fact that there is no particular reason why they should prefer to be included — it is unlikely that we would deny them the right to cite a precedent in their favor if the suit were successful — there are, again, severe pragmatic problems of notification.[36]

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vention as a means of special protection, recognizing that the stare decisis impact of the litigation might impair the applicant's ability to protect his interests. Rule 24(a) provides that applicants may intervene as of right when "disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect [his] interest." *See* Nuesse v. Camp, 385 F.2d 694, 699 (D.C. Cir. 1967).

The *Atlantis* approach has been followed in other, analogous circumstances. *See* Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977); Air Lines Stewards Local 550 v. American Airlines, Inc., 455 F.2d 101 (7th Cir. 1972); Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Henry v. First Nat'l Bank, 50 F.R.D. 251 (N.D. Miss. 1970), *vacated and remanded on other grounds*, 444 F.2d 1300 (5th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972).

[36] If, as we might suspect, later litigants were allowed to take advantage of a

Denying an adverse ruling any legal effect would be the approach most protective of third party rights. While it seems on the one hand unreasonable to give the ruling a binding effect only if it is favorable, this approach would to some extent be consistent with the curtailment of the mutuality requirement for collateral estoppel.[37] Still, serious problems remain. One is whether a later court can really be expected to ignore the reasoning in the prior case. Once a competent court canvasses the case authority and analyzes the parties' arguments, the result may still be viewed as influential. In addition, this approach leaves unsolved the present problem of providing a workable definition of a traditional case or controversy. Presumably, this distinction would still have to be made. Although a traditional case would bind subsequent traditional and ideological litigation, an ideological case would only bind subsequent ideological litigation. Thus, to determine whether the resolution of a prior dispute determines the outcome in a new dispute, we would have to know whether traditional cases with traditional plaintiffs were involved.

Despite its problems, that approach might still be preferable to the third alternative: giving the precedent its usual effect but substituting other criteria of representative adequacy for the traditional "similarity of circumstances" one. We might assume, for instance, that any well-established and well-financed public interest group with enough concern to initiate litigation should be allowed to assert the public interest as a private "attorney general." But there are reasons to doubt whether self-appointed ideological plaintiffs should be presumed to be adequate representatives.

Isn't a traditional plaintiff better able vividly to illustrate the adverse effects of the complained-of activity?[38] Isn't there a danger that by seeking to change the law too rapidly an ideological plaintiff will take greater risks by framing the issues in a broader, more controversial, manner?[39] Public interest lawyers acknowledge that these dangers exist even in tradi-

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precedent even though they did not "opt in," the presumptive exclusion of absent third parties would be the practical equivalent of the second proposed procedural safeguard, since it would effectively deny an adverse ruling any precedential impact.

[37] *See* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). For a list of the jurisdictions that have abandoned the mutuality requirement, see 50 C.J.S. *Judgments* § 765 (1947 & Supp. 1979).

[38] *See* Brilmayer, *Judicial Review, Justiciability, and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, 827 (1977).

[39] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 731–41 (1972). The club deliberately omitted from its complaint any allegation that its members had been injured in fact, and thus it rejected the traditional indicia of standing. One suspects that its arguments would have been heard more sympathetically if it had adopted a less radical stance. *See also* Brilmayer, *supra* note 38, at 820 & n.62.

tional litigation.[40] Yet so long as they represent individual clients to whom an ethical duty is owed, their risk remains within ethical limits.[41] The danger is that without a real client, and without a sense of accountability to an identifiable individual, their capacity truly to represent the public interest would be diminished.

In fact, one of the best explanations of the case or controversy requirement may be the desire of courts to ensure the accountability of representatives. One reason, we said, for allowing courts to review legislation is that minority groups and unpopular points of view may not be adequately represented in the processes of democratic decisionmaking.[42] The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge. This guarantee should be seen as a minimal element of the legitimacy of a legal system which imposes legal burdens upon its members. At some point in the legal process the affected individuals should have their day in court.

III. SELF-DETERMINATION

The "minority viewpoint" justification also bears on the third perspective on the case or controversy requirement: the self-determination perspective. This third approach argues that persons should not be able to assert the rights of others *even assuming* they are good representatives, that is, likely to prevail on the merits. This third line of reasoning shows that the justiciability requirements serve as procedural safeguards for the important liberal value of self-determination. It is frequently argued that the community should not interfere with individual personal choices which do not harm anyone else. Legal issues such as regulation of private sexual conduct, drug use, and abortion are often discussed in these terms. The values implicit in such an attitude include individualism; distaste for governmental paternalism and the moral evangelism of our neighbors (whether based on religion, artistic taste, or exuberance for jogging); and mutual respect or at least toler-

[40] Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978). *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

[41] *See, e.g.*, Meltsner, *Litigating Against the Death Penalty*, 82 YALE L.J. 1111 (1973) (loyalty to client causes lawyers to raise all possible arguments, despite the risk that they will impede broad litigation goals). For a discussion of some ways in which the traditional attorney-client privilege is altered in public law litigation, see J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 31–33 (1978). *See generally* B. WEISBROD, PUBLIC INTEREST LAW (1978).

[42] *See* p. 301 *supra*.

ance for one another's choices. A contrasting cluster of values emphasizes a more intimate relationship between the individual and the community; social or political bodies are seen as having interests or obligations in their own right; for instance they may inquire into the internal well-being of citizens, assess their sickness or health, and take action. Although there are clearly elements of this latter view in American jurisprudence, it is probably the predominant view that if an activity really threatens no one but the actor then the community should not interfere coercively. So often do debates form themselves around the empirical question of the existence of harm to others that it seems that many people perceive this to be where the important issue lies.

This concept of "self-regarding acts" has an important place in substantive constitutional law. Privacy related arguments, in particular, are easily derivable from such a premise.[43] So are first amendment protections for speech that annoys, angers, or disgusts, but does not actually hurt anyone.[44] One author in fact attempts to use this principle as a foundation for constitutional rights generally, distinguishing between "personal" preferences about one's own enjoyment of goods or opportunities, and "external" preferences about the assignment of goods and opportunities to others.[45] Of course, it is likely to be difficult to disentangle these different sorts of preferences in some cases. It may be that I have such a strong moral distaste for someone else's conduct that the thought that such conduct is allowed actually upsets me physically. The fact of harm is sometimes therefore not enough; the harm resulting from overly acute moral sensitivity may not be morally cognizable.

The doctrine of "standing to sue" also reflects the ideal of self-determination. It holds that litigation may only be initiated by an individual with a "personal stake" in the dispute[46] — that is, by someone with personal and not merely external preferences about the outcome. Moreover, in making decisions about standing to sue the courts have discerned two distinct issues. The first, "injury in fact,"[47] corresponds to the prob-

[43] For example, the argument in favor of permitting contraception is based primarily on the notion that the use of contraceptive devices does not affect anyone but the users.

[44] Obscene materials might be protected under this theory, since reading pornography arguably does not affect anyone else's interests.

[45] R. DWORKIN, *supra* note 19. *See also* H.L.A. HART, LAW, LIBERTY AND MORALITY (1969). *But see* P. DEVLIN, THE ENFORCEMENT OF MORALS (1968).

[46] *See* cases cited note 6 *supra*.

[47] *See, e.g.*, Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 152 (1970) (standing under case or controversy standard requires injury in fact and violation of legal right).

lem of whether some complained-of private activity actually hurts others. The second is whether that injury is legally cognizable;[48] it corresponds to the problem of whether an admittedly real impact upon others is an interest the legal system protects or merely a harm one is expected to bear.

The close relationship between the standing doctrine and the liberal ideal of self-definition can be illustrated by two recent cases. In *Gilmore v. Utah*,[49] the mother of a convicted murderer sought to appeal her son's death sentence to the United States Supreme Court. The son declined to appeal, although he had a colorable claim that the statute under which he had been sentenced was unconstitutional due to the eighth amendment. The standing objection was raised by the son's attorneys. Although the majority did not refer to this issue, Chief Justice Burger, who concurred, wrote, "[T]his Court has jurisdiction pursuant to article III of the Constitution only over 'cases and controversies.'"[50] Justice Marshall, dissenting, argued that "the Eighth Amendment not only protects the rights of individuals not to be victims of cruel and unusual punishment, but . . . also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."[51]

It may be that Justice Marshall is correct and that we should recognize such a societal interest. If so, the standing doctrine would have to fall.[52] Such a right would undermine

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[48] *See, e.g., id.* at 152–53; Jenkins v. McKeithen, 395 U.S. 411, 423–24 (1969); *cf.* Hardin v. Kentucky Utils. Co., 390 U.S. 1, 5–6 (1968) (respondent, member of class protected by statute, has standing to sue); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939) (suit to restrain execution of an unconstitutional statute permitted only to protect legal rights).

[49] 429 U.S. 1012 (1976). It is instructive to compare *Gilmore* with Rosenberg v. United States, 346 U.S. 273 (1953), in which an interested "next friend" sought to present legal arguments against the Rosenbergs' execution that their counsel had declined to raise. The Rosenbergs dropped their objection and the argument was heard; the challenge was rejected on the merits. In a concurring opinion Justice Jackson objected to the irregular manner in which the issue was raised:

> Every lawyer familiar with the workings of our criminal courts and the habits of our bar will agree that this precedent presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases. The lower court refused to accept Edelman's intrusion but by the order in question must accept him as having standing to take part in, or to take over, the Rosenbergs' case. That such disorderly intervention is more likely to prejudice rather than to help the representation of accused persons in highly publicized cases is self-evident. We discountenance this practice.

Id. at 292.

[50] 429 U.S. at 1016.

[51] *Id.* at 1019.

[52] One might make an analogy to corporation law and to an intuitive sense that shareholders should have a right to prevent the corporation from engaging in illegal

the prohibition against regulating self-regarding acts; this prohibition rests in part on the assumption that societal interest is really the sum total of personal interests of individuals, and not some ghostly entity. The idea of community interest apart from the needs of particular people suggests it may be necessary to pressure people into changing life plans and opinions for the good of some undefinable, elusive common good.[53]

The second case involved Reverend Moon's Unification Church.[54] Tamara Schuppin's parents brought suit in federal court against that organization when they could not convince their daughter to leave the Moonies and return home. Of the twelve counts, all but two involved allegations of wrongs to Tamara herself, for which the parents sought remedies on her behalf; the remainder dealt with Moon's purported alienation of Tamara's affection, which previously, they alleged, had been directed toward the parents. Tamara was of age and had not been adjudged incompetent. The only evidence suggesting incompetence was the opinion of a psychiatrist who had never seen her but had previously diagnosed other members of the Unification Church. Citing *Gilmore*, the district court dismissed eight of the counts filed on Tamara's behalf but against her wishes because of the parents' lack of standing.

The significance of these cases is not the suggestion that letting Tamara Schuppin stay with the Moonies and letting Gary Gilmore die were easy or obvious answers.[55] Rather, these cases illustrate how indistinguishable the factors involved in standing are from the issue of paternalism. If I have a personal interest in the dispute, a tangible stake, then I seem to have both a moral and a legal right to involve myself. It does not count as sufficient reason for either legal or moral action that I believe the action will help some person who does not want the "benefit."[56]

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acts, even if the acts actually benefit the corporation. *See* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5823, 5948 (1974).

[53] For a discussion of the relationship between liberal values such as free speech and the idea that "society" is not entitled to prefer certain lifestyles over others, see Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY (S. Hampshire ed. 1978).

[54] Schuppin v. Unification Church, 435 F. Supp. 603 (D. Vt.), *aff'd*, 573 F.2d 1295 (2d Cir. 1977).

[55] These courts may have been mistaken, for instance, in their findings of competence. Competence is often a troubling point for arguments about paternalism; at some point lack of wisdom shades into incapacity due to idiocy, infancy, or lunacy; intervention against the will of the ward then becomes justifiable, if not indeed necessary.

[56] It is true that in some cases a court decision invalidating a statute will not "force" anyone to take any "benefit" he does not want. Unlike Gilmore and Schuppin, the neighbor in the first amendment hypothetical remains free not to post signs. It still seems inappropriate, however, to allow the concerned citizen to define the neigh-

These are unusual cases, and not just because of the unusual preferences of the third parties involved. They are also unusual because it is rare, in cases where standing is denied, to have such complete information about the preferences of the *person* who would purportedly benefit. Of course, in cases where standing is not an issue because a traditional plaintiff is involved, there is also evidence concerning the wishes of members of the affected group; at least one group member, the plaintiff, desires litigation. On the other hand, in ideologically motivated litigation, there may be no indication whatsoever of the wishes of the affected group. Thus advocates of procedural reform could point out that it takes only one group member to file a traditional suit, and that it would be unreasonable to assume that all members of the affected group are hostile to initiation of litigation.

It probably would be unreasonable to make this assumption; but that is not what the standing doctrine does. It merely places the burden of proof on this issue on the would-be representative. Certainly he is in a better position than the defendant to demonstrate whether there is at least one willing beneficiary; surely the defendant cannot be expected to prove that *no* such person exists. The very leniency of requiring only one aggrieved party whose interests may count as a reason for action makes it necessary to allocate the burden of proof this way.

The procedural case or controversy requirement is, therefore, an epistemological device. To abandon the case or controversy doctrines would be, in effect, to say that it is not important to find out who is personally affected and what their wishes are. In the first amendment hypothetical, the doctrines mean that the citizen cannot initiate litigation on his neighbor's behalf without his neighbor's cooperation. He cannot, more generally, assert the first amendment rights of the world at large without the cooperation of at least one member of the affected group. We do not have to be so extreme as the philosopher who would prevent the government from taking *any* external preferences into account.[57] But actions on behalf of other persons should be prohibited when those persons do not welcome the purported benefits; *i.e.*, *coercing* people "in their own best interests." The ideal role for persons with

bor's "best interests" and assert them in court. One author, who apparently recognizes that there is a relationship between the existence of a community interest and relaxation of the standing requirement, nevertheless concludes that communal values warrant procedural reform. J. VINING, LEGAL IDENTITY (1978). He does not discuss the effect of this conservative ideology on substantive constitutional norms.

[57] *See* Dworkin, *supra* note 53.

ideological interests is then to seek out, inform, and support litigants whose rights are immediately at stake.

IV. APPLICATIONS

We would be unlikely, in practice, to encounter so easy a case as the hypothetical illustration at the outset of this paper. No one would be likely to attempt litigation so clearly in violation of existing procedural requirements. For the same reason, existing precedents do not deal with such simple problems. Since both the case law we would like to explain and the new problems we will have to solve are bound to be far more complex, it is appropriate to ask how the reasons just given for the article III case or controversy doctrine would influence our treatment of borderline situations. The discussion below applies these perspectives to identify five considerations that, if present, militate in favor of review in cases where the plaintiff's personal stake is problematic.

Two preliminary remarks are appropriate. First, it will be apparent that the approach used to identify these considerations is quite flexible. Rather than attempting a rigid definition of the phrase "case or controversy," it looks behind the constitutional language to ask whether the purposes served by the justiciability doctrine allow or prohibit litigation. Second, the considerations that will be discussed are not novel, although they are derived from an analysis that is, in some respects, unlike the reasoning found in the case law. Indeed, one of the strengths of the perspectives outlined above is that they lead to basically the traditional sorts of reasoning and results. It is therefore possible to argue that these perspectives do in fact capture intuitive notions of justiciability and judicial function. Moreover, adoption of such perspectives does not involve a radical departure from existing precedents.

A. The Issue Would Not Otherwise Be Litigated

The first consideration is whether the legal issue posed by the dispute might be resolved later in another dispute. Each of the three perspectives indicate that this is a relevant question. The restraint perspective suggests that courts should be least hesitant to adjudicate issues which will not otherwise arise, since they will not thereby encroach on the prerogatives of later courts. The desire to ensure adequate representation is not implicated, because there is no danger of prejudicing the rights of absent parties in later suits which, by hypothesis, will not occur. For similar reasons, the self-determination problem

does not arise. Presumably, there are no persons better situated to make the claim, whose arguments are being advanced without their consent.

Examination of some doctrinal developments shows how the fact that an issue will not otherwise be litigated influences the courts. Under a mootness exception for issues that are "capable of repetition, yet evading review,"[58] a technically moot challenge to an abortion statute has been allowed because such a case could never reach the Supreme Court during the pregnancy.[59] Another example is the leniency of the ripeness doctrine when easily chilled first amendment rights are at stake. The reasoning is that if an early challenge is not allowed, individuals will forego their rights and the constitutionality of the law will never be litigated.[60]

B. The Litigation Would Not Establish a Precedent

This consideration is also suggested by all three perspectives: if no precedent is established, then later courts' prerogatives are not violated and third parties' rights to representation and self-determination are less in jeopardy. Two cases in which the Solicitor General confessed error on appeal suggest that the courts will consider whether precedent will be established. The question in both cases was whether the court should proceed even though the newly produced agreement between the parties put an end to the controversy. In *Young v. United States*[61] an agreement on the issue of law was not accepted because the judgment would be precedent, "and the proper administration of the criminal law cannot be left merely to the stipulation of the parties."[62] In *Casey v. United States* the court accepted a confession that there had been an unreasonable search and seizure because to do so "in this case . . . would not involve the establishment of any precedent."[63] Similarly, courts are willing to proceed in other types of litigation in which the parties are not truly adverse

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[58] *See* Sosna v. Iowa, 419 U.S. 393, 399–400 (1975); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); South Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911), *quoted in* Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975).

[59] Roe v. Wade, 410 U.S. 113, 124–25 (1973).

[60] *See* Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965) (allowing overbreadth challenge). *See also* Coates v. Cincinnati, 402 U.S. 611 (1972); Cramp v. Orange County, 368 U.S. 278 (1961).

[61] 315 U.S. 257 (1942).

[62] *Id.* at 259.

[63] 343 U.S. 808 (1952).

— such as litigation involving consent decrees — in part because no precedent will be established.[64]

C. Constitutional Rights Will Be No Less Jeopardized If Adjudication Is Disallowed Than If The Issue Is Litigated And Lost On The Merits

This consideration is most relevant from a representation perspective: protection of the rights of absent third parties does not warrant disallowing litigation when that result has the same effect as a loss on the merits. A classic example of such a case is *NAACP v. Alabama*,[65] in which a political organization sought to protect its members by keeping its membership list secret. Since forcing the members to assert their own rights would have resulted in the same loss of rights as if the organization had litigated and lost — in fact, the issue might have been considered moot with regard to any plaintiff who appeared — the Court allowed the organization to litigate the free association issue.

D. The Individuals Possessing the Right Cannot Assert It Themselves

In challenges to statutes regulating relationships between individuals it sometimes happens that the threat to one person's right stems from coercion of another person. One thinks of laws that prohibit the issuance of contraceptives; such statutes infringe the patient's rights by regulating the doctor.[66] Covenants against the sale of a particular piece of property to minority group members have a similar effect; these agreements violate the buyer's rights by coercing the seller.[67] The self-determination perspective suggests that we ordinarily prefer persons to assert their own rights. This preference should not be considered determinative, however, in situations like these; for example, either the doctor or the patient should be permitted to sue.

E. The Would-Be Litigant Has Evidence Of Representative Capacity Other Than Membership In The Affected Group

In some cases, it may be possible to establish representative capacity with evidence other than present membership in the

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[64] *See, e.g.*, Tutun v. United States, 270 U.S. 568 (1926).

[65] 357 U.S. 449 (1958).

[66] Eisenstadt v. Baird, 405 U.S. 438 (1972) (distinguishing Tileston v. Ullman, 318 U.S. 44 (1943)).

[67] Barrows v. Jackson, 346 U.S. 249 (1953).

affected group. For example, the representation arguments against allowing ideological challenges apply less forcefully when the would-be plaintiff was once but is no longer a class member.[68] The danger to be avoided is that presented by the self-appointed plaintiff whose sole claim to representative capacity is the fact that he thinks a statute is unconstitutional because it violates someone else's rights.

V. An Example

The above discussion suggested that the courts have been relying on these considerations all along, at least implicitly. A more extensive examination of a particular area of case law illustrates this point. The example is organizational standing, for which the predominant concern is the last one mentioned — alternative evidence of representative capacity.

It has long been established that a voluntary trade organization has standing to assert those interests of its members that are related to the trade activities for which the organization was formed.[69] A club or social organization has comparable rights to sue.[70] In light of the stakeholders' voluntary membership in the organization, their right to withdraw, and the organization's accountability to them, it is safe to presume representative capacity. The Supreme Court recently summarized and reaffirmed the standing of trade organizations in dicta in the case of *Hunt v. Washington Apple Advertising Commission*,[71] stating the following criteria:

> [A]n association has standing to bring suit on behalf of its members when:
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> a) its members would otherwise have standing to sue in their own right;
>
> b) the interests it seeks to protect are germane to the organization's purpose; and
>
> c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.[72]

Washington Apple did not itself involve a voluntary trade organization; the criteria just cited were applied, by analogy,

[68] *See* Babbit v. United Farm Workers, 99 S. Ct. 2301 (1979) (right of United Farm Workers to represent Arizona farm workers in challenge to Arizona union election law).

[69] *See* National Motor Freight Ass'n v. United States, 372 U.S. 246, 247 (1963) (per curiam); Warth v. Seldin, 422 U.S. 490, 511 (1975).

[70] *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

[71] 432 U.S. 333 (1977).

[72] *Id.* at 343.

to a governmental commission that the state of Washington had created and that all apple growers were compelled to support. The Commission, composed of thirteen elected representatives of the apple industry, devotes itself to the promotion of apples through advertising and scientific and market research; it does not itself grow or market apples. Thus when the Commission sought to challenge the constitutionality of a North Carolina statute regulating the packaging of apples, it was met with the argument that it lacked the "personal stake" necessary to standing, having only an abstract concern with the well-being of the apple industry. Defendants also argued that no disability prevented the growers and dealers from coming forward to assert their own rights. Cases involving voluntary trade organizations were said to be inapplicable since the Commission was not a trade organization and had no "members" at all.

A unanimous Court sensibly rejected these arguments. The Commission was, the Court said, the functional equivalent of a voluntary trade organization. While the growers were not "members" themselves, they elected all of the Commission's members. Additionally, the growers financed the organization; "in a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests."[73] The Court also noted that harm to the Washington apple industry might reduce the assessments supporting the Commission's activities. "We therefore agree with the District Court," wrote the Chief Justice, "that the Commission has standing to bring this action in a representational capacity."[74] In the clearest possible sense, the Commission was not a self-appointed representative.

To be contrasted with *Washington Apple* is a recent district court case, *Health Research Group v. Kennedy*,[75] in which standing was denied. The plaintiff, a Nader group, sought to challenge Food and Drug Administration regulations allowing certain drugs to be marketed, arguing that its "supporters" would be subjected to economic and health risks. Judge Sirica denied the plaintiff standing to raise the challenge. *Washington Apple* was said to suggest that there must be a substantial nexus between the organization and the parties it purported to represent, when the parties were not actual members. The plaintiff, it was pointed out, had no formal continuing rela-

[73] *Id.* at 345.
[74] *Id.*
[75] 82 F.R.D. 21 (D.D.C. 1979).

tionship with its small contributors and its undefined "supporters"; moreover, these supporters had no control over the organization, Nader, or the board of directors he appointed.

> Having structured them as nonmembership organizations for the express purpose of 'promoting efficiency' and minimizing the 'expense and other burdens' of membership groups, Mr. Nader would hardly be in a position to seriously argue that his contributors or supporters exercise any substantial degree of even indirect control over his organizations.[76]

The court also noted that no effective control was possible where the funds for Health Research Group were channeled first through an umbrella organization.[77] Thus, at least in the area of organizational standing to sue, the courts are on the verge of an avowedly representational approach. It is to be hoped that they will bring this line of reasoning out into the open.

VI. CONCLUSION

It should be clear by now that the typical "liberal" and "conservative" reactions to the justiciability requirements are shortsighted. Liberals usually argue for greater access to federal courts; conservatives frequently assert that access should be limited. But it is coincidental that at this point in history it is liberal challenges to legislation that are being disallowed. The Constitution has its conservative aspects also, and at other points in history it has been the conservatives who have sought access to the courts.[78] The traditional liberal party line is sensible only when the action the court would take is more "liberal" than the legislation under attack, and also more "liberal" than the decision a later court would make if consideration of the issues was postponed.

In fact, attempts to bring about increased social reform in courts through abandonment of justiciability limitations are counterproductive in the long run. Anyone wishing to use courts as a tool for social engineering should favor steps that

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[76] *Id.* at 27.

[77] *Id.* at 28.

[78] Contemporary observers might characterize the era of Lochner v. New York, 198 U.S. 45 (1905), in this manner. Current litigation over affirmative action programs — litigation that is also subject to attack on justiciability grounds — suggests that we will be seeing more "conservative" test cases in the future. *See also* NCAA v. Califano, 444 F. Supp. 425 (D. Kan.) (challenge to HEW regulation implementing Title IX dismissed for want of standing since college athletic association was not a representative chosen by the colleges), *appeal docketed*, No. 78-1632 (10th Cir. Apr. 24, 1978).

increase court power; threatening the institution of stare decisis has the opposite effect. Anyone who wishes to protect the rights of underrepresented third parties should be attempting to involve those persons in the judicial process, in order to ensure representation and self-determination.

It is ironic that, in attempting to gear up the judicial machinery to correct legislative excesses, reformers would attempt to replicate some of the worst aspects of legislative government. One of the features which most differentiates judicial from legislative decisionmaking, and makes it more sensitive to those who will be affected by the decision, is the fact that courts respond to requests of individuals whose personal rights are at stake. Surely it would be desirable to increase the involvement of affected groups in the legislative process. It is not that our judicial system is so perfectly just and sensitive, but rather that abandonment of these procedural limitations seems guaranteed to make things worse. I suspect that these limitations have evolved in accordance with a set of unarticulated assumptions roughly congruent with those outlined in this paper. The implicit premises of article III should be explicitly developed as a tool of constitutional jurisprudence.